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IN THE

Supreme Court of the United States

October Term, 1964

No. 989

JEROME J. HASKELL,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Jerome J. Haskell prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered against him in the above entitled case on January 27, 1964.

A. The Opinion Below

The opinion of the Court of Appeals in this case has been officially reported in 327 F. 2d 281 (1964). It is set forth in Appendix A annexed to this petition.

B. Jurisdiction

The judgment of the Court of Appeals was entered on January 27, 1964. On February 19, 1964, a petition for a hearing thereof was denied by said court. The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court Rules and Title 28, United States Code, Section 1254(1) on the ground that review by the Supreme Court by a writ of certiorari is sought of a judgment of affirmance by the United States Court of Appeals for the Second Circuit.

C. Questions Presented

Was the petitioner afforded a fair trial when:

1. The United States Attorney relying on erroneous information received from the Federal Bureau of Investigation, cross-examined the petitioner as to a non-existent grand larceny felony conviction?

2. The court, in its charge to the jury, advanced the singular proposition in an income tax conspiracy prosecution that the liberty of "the free speaking world" was dependent upon the efforts of the Commissioner of Internal Revenue?

D. Constitutional Provisions and Statutes

The Constitutional provisions and statutes involved are:

1. United States Constitution, Amendment V.

2. United States Code, Title 18, Section 371.

All of the foregoing are set forth in full in Appendix B annexed to this petition.

E. Summary Statement

A one count indictment charging a violation of the general conspiracy statute, 18 U.S.C. 371, was returned against the petitioner. He was found guilty and sentenced to imprisonment for a year and a day, fined Five Thousand ($5,000.00) Dollars and ordered to pay the costs of prosecution.

The petitioner is presently enlarged on Two Thousand ($2,000.00) bail.

F. Statement of the Case

Proceedings Below

When the trial of the petitioner began in the United States District Court for the District of Connecticut, he was cloaked in the presumption of innocence. This heritage was to continue through the jury's deliberations, unless and until it found him guilty beyond a reasonable doubt. It could find him so only on evidence submitted to it, unshrouded by gross impropriety and solely within the compass of due process.

When the petitioner testified on his own behalf, he was entitled to that protection and the right to present his defense before a jury unprejudiced by prosecutorial error.

There neither is, nor indeed can there be, any question that when the petitioner testified he was not a felon. That fact remained uncontrovertable and constant. The failure of the United States Attorney to realize it, his consequent efforts to exculpate himself, and the Court's admonitory instructions can be regarded as naught but inefficacious.

On direct examination, the petitioner was asked and affirmatively responded that he had in 1934 or 1935 been con-

victed of petty larceny (Gov. App. 66A).* On Cross-examination, the prosecutor initially had the petitioner repeat his admission to a petty larceny conviction and then unequivocally asked him whether he had not been convicted of grand rather than petty larceny (Pet. App. 25a, 27a).

The petitioner was thereupon shown a record of the Federal Bureau of Investigation (Pet. App. 169a), and asked whether "that ever happened." A colloquy then ensued between the Court and petitioner's counsel with the former suggesting that interruption of the cross-examination be kept at a minimum (Pet. App. 25a, 27a). Moreover the Court conceded that it was obliged

> "to rely on the good judgment and fairness of the prosecutor on all matters, and specifically this matter of impeaching the credibility of the witness, which is what is being done here by questions regarding his alleged prior criminal record" (Pet. App. 27a-28a).

Exception was thereupon taken and noted (Pet. App. 28a).

The prosecutor, with dogged persistence, thereupon asked the petitioner whether he had not, on August 26, 1942, in New York, been convicted of grand larceny. Again the petitioner unequivocally responded in the negative. Thereupon the United States Attorney offered in evidence an abridged version of the Federal Bureau of Investigation record (Pet. App. 28a).

Moreover, the Court was then informed by the prosecutor that the information contained in the aforesaid record had, more than a week prior, been given to petitioner's counsel.

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* "Gov. App." refers to the page numbers of the Appendix filed by the Government in the Court of Appeals. "Pet. App." refers to the petitioner's appendix therein filed.

The court sustained an objection to the proffered offer of the record in evidence, but denied a motion for a mistrial (Pet. App. 29a-31a).

Later that day the prosecutor importunately informed the Court that the petitioner had been convicted in 1942 of petty, but not grand larceny (Pet. App. 43a). He then incredulously requested the Court that it charge the jury without:

> "an elaborate charge, just that my use of the word 'grand' this morning should be disregarded by them, and the Government concedes it was petty larceny, and not grand larceny."

The Court thereupon inquired whether the petitioner would have any objection to the Court so instructing the jury. Counsel for the petitioner did object, and the Court quite properly stated that in a criminal case it was not going to require a defendant to agree to anything. However, it voiced its understanding that a copy of the arrest record had been furnished to defense counsel. The prosecutor thereupon corrected the Court by stating that a copy had not been furnished, but that one of the defense counsel had been informed of the grand larceny conviction and had evidenced surprise. The defense counsel admitted that he had been so informed, investigated the matter, became convinced that the petitioner had never been convicted of grand larceny, and was aware that the petitioner was going to testify on his own behalf.

The prosecutor stated, "You didn't tell me that." He did not, however, advise the Court as to the basis in an adversarial criminal litigation wherein a defense counsel was either obligated or in any fashion called upon to give such advise (Pet. App. 43a-46a).

The Court thereupon laconically stated:

> "I instruct the jury totally to disregard any reference to a conviction for grand larceny" (Pet. App. 53a),

and

> "I will ask each of you ladies and gentlemen to totally wipe the slate clean, so far as Mr. Haskell is concerned with respect to any reference even in the Government's question, to a charge of grand larceny" (Pet. App. 54a).

Exception was timely taken as to all the foregoing (Pet. App. 56a).

Subsequent to the entry of the judgment of conviction the petitioner moved under Rule 29 of the Federal Rules of Criminal Procedure to set aside the verdict and enter a judgment of acquittal, and pursuant to Rule 33 for a new trial. Neither of those motions were then proper. Both were untimely and the District Court was completely without jurisdiction. Nonetheless, the Court wrote a lengthy opinion which has been reported in 217 F. Supp. 534 (1963), and has been set forth in Pet. App. 151a-168a.

The opinion was in essence a recapitulation of what had transpired at the trial. It encompassed a judicial finding that "the conduct of the United States Attorney was beyond reproach" (Pet. App. 166a), and that "the defendant was in no way prejudiced" (Pet. App. 167a).

Furthermore that:

> "This has been made even more manifest by subsequent disclosures in defendant's pre-sentence report. After all, the most defendant could have hoped for was a mistrial, followed by a new trial. On a new

> trial, in view of the disclosures in his pre-sentence report, his prior criminal record necessarily would place him in a light less favorable than that in which he was placed in the trial just concluded.'"

The opinion was noteworthy in that it absolved the United States Attorney from error that came in being simply because he did not check his facts. It was compounded by the trial court referring to disclosures in a secret pre-sentence report, inferring that the petitioner would testify on his own behalf at a subsequent trial. He thus would fare far worse because of that type of a criminal record which would make his testimony subject to collateral impeachment.

The Government argued in the Court of Appeals that it had throughout the trial, attempted to be fair, and that whatever wrong had been done was caused by inadvertence (Govt. Brief pp. 21-22). It then protested, although a prosecutor should be immune to improper tactics (*Dugan Drug Stores, Inc.* v. *United States*, 326 F. 2d 834 (5th Cir. 1964)], that it had been the subject of an "ambush" because there had not been timely objection. Misplaced solace was sought in *United States* v. *Agueci*, 310 F. 2d 817, 840 (2nd Cir. 1962), where an attack on prosecutorial impropriety was ab initio raised on appeal. Finally omnibus support was sought by reliance on the standard prosecutorial appellate arguments that (1) The Trial Court cured the error and (2) The defendant was in any event, guilty (Govt. Brief pp. 23-24).

The Court of Appeals held that although as a general rule it was grossly improper for a cross-examiner to erroneously suggest that a witness was a felon, it was not so in the case on appeal. For here there was an honest prose-

cutorial reliance on an F.B.I. report, pre-trial information to defense counsel of the intent to bring up the grand larceny conviction, prompt remedial action by the prosecutor and vigorous protection by the Court of the petitioner's rights. The Court held that the foregoing, coupled with the failure to object to the two specific questions dealing with the grand larceny convictions, taken as a whole, did not constitute reversible error.

G. Reasons for Granting the Writ

I.

It Was Grossly Improper for a United States Attorney to Cross-Examine the Petitioner as to a Non-Existent Grand Larceny Felony Conviction

It matters little if the petitioner be deprived of due process of law, that it came about because of prosecutorial inadvertence rather than by design. Surely in this decade, no prosecutor can attempt to claim credit by not deliberately designing to degrade a defendant through the knowing use of questions as to a non-existent felony. Indeed the holding of the Trial Judge that the conduct of the United States Attorney was "beyond reproach" (Pet. App. 166a) as well as that of the Court of Appeals that the "prosecutor's examination was based on an honest reliance on the F.B.I. report" casts the blame solely on the Federal Bureau of Investigation. But such holdings indicate a beclouding of the respective roles of prosecutor and investigator.

The United States Attorney is in the trial of federal criminal litigation the representative of the Sovereign. He may delegate duties, he cannot delegate responsibility. When the trial opened the responsibility was his, and when as

in this case, he offered an F.B.I. record into evidence (Pet. App. 29a), he alone was answerable as to the contents thereof. The Federal Bureau of Investigation is a fact finding body which may be called upon to gather evidence at the behest of a United States Attorney. It does not prosecute nor does it determine who is to be prosecuted. It certainly does not offer reports in evidence. The failure of a United States Attorney to check upon an F.B.I. report is his failure alone.

The Sixth Circuit held in *Pearson* v. *United States*, 192 F. 2d 681 (6th Cir. 1951), when it reversed a conviction where the United States Attorney asked the defendant whether he had been convicted in 1934 of receiving stolen property whereas in actuality he had but been arrested and the warrant was dismissed without even a submission to the Grand Jury, at 697-9 that:

> "When on his trial, Twitty was asked by government counsel whether he had not been convicted of the charge of receiving stolen property and given a thirty-day sentence, counsel either knew, or by the slightest inquiry could have learned, that Twitty had never been convicted of such charge, and that the warrant had been dismissed, as above set forth. Anyone who examined the records of the case—and they were right there in Memphis where the case was being tried—would have seen at once the statement which had been filed by the assistant attorney general. Counsel may have proceeded under the assumption that such a question was proper, but if so, he was in error. Whatever the explanation may be for asking the question, the result was that Twitty was gravely prejudiced before the jury by such action."

The exculpation of the prosecutor and the shifting of responsibility to the Federal Bureau of Investigation in no way minimized the harm done to the petitioner. For it was the petitioner who was twice asked before a jury in an income tax conspiracy prosecution whether he had ever been convicted of grand larceny. The harm was done to him, its effect upon the jury as to his credibility was incalculable. For as was stated in *Pearson* v. *United States*, *supra*, at 699:

> "The action of government counsel in asking Twitty whether he had not been previously convicted of receiving stolen property on a stated date, when he had not been so convicted, and when there was no basis for such an inquiry, was prejudicial to the right of the defendant to a fair trial."

The Court of Appeals of the Seventh Circuit in *United States* v. *Lexi*, 177 F. 2d 827 (7th Cir. 1949), was adamant in holding that the action of a prosecutor in merely asking in a conspiracy prosecution if a defendant had been previously convicted of tax evasion, when the judgment thereof had not been entered, constituted reversible error. Here however there was neither suggestion nor subtlety, but an unequivocal insinuation that the petitioner was not only a felon, but was also just not telling the truth. Such prosecutorial conduct was characterized by McCormick on Evidence as:

> "The spirit of the rule condemns not only evidence of other crimes, not independently relevant, but also questions which though negatively answered, carry with them the insinuation that the accused committed the other crimes." (p. 327)

It was held to be reversible error in *United States* v. *Thurman*, 316 F. 2d 205 (9th Cir. 1963), to suggest on the

cross-examination of a defendant, that he had committed criminal acts not resulting in conviction, other than those with which he was charged. That Court held at 206 citing *Michelson* v. *United States*, 335 U.S. 469, 482, that

> "only a conviction . . . may be inquired about to undermine the trustworthiness of a witness."

The Government there as here suggested that the error was "technical" and in the light of the entire record, harmless. However, the Court pithly responded by saying at 206:

> "But the prejudicial effect of such material is notorious. 1 Wigmore, Evidence § 194 (3d ed. 1940); McCormick, Evidence 327 (1954). Indeed, the danger is so strong that the jury will infer from unrelated criminal conduct that the defendant probably committed the offense charged, or will condemn the defendant either for the unrelated conduct or simply because he is a bad person, regardless of his guilt or innocence of the offense charged, that admission of such material is treated as obviously prejudicial and admonitory instructions are commonly considered inefficacious."

The Court of Appeals in its opinion commented that the defense counsel had been apprised of the proffered grand larceny conviction. However, that in no way shifted the prosecutorial responsibility. A defense counsel is certainly under no duty to nor can he readily check out material contained in an F.B.I. report. Can it now be asserted that an attorney for a defendant in a federal criminal prosecution has the anticipatory burden of validating collateral matters which may be utilized by the prosecutor in impeaching his own client.

Finally, to contend that no specific objection was taken to the specific questions dealing with the alleged grand larceny conviction is to initially overlook that the entire proceedings were inundated with defense objections and applications for mistrial. But a failure to object is not the pivotal issue for the questions if based on fact were correct. As was stated in *Pearson* v. *United States*, *supra*, at 698:

> "At the time that Twitty was asked whether he had been previously convicted, in 1934, of being a receiver of stolen property, and served a sentence therefor, it is to be remarked that his counsel could not have objected to the question, inasmuch as it would have been an entirely legitimate inquiry, if Twitty had actually been convicted; and his counsel could not have prevented the introduction into evidence of the court record of such conviction, since this is the proper mode of interrogation of a defendant who has been previously convicted and the method of proof in case of such defendant's denial."

It is specifically because the instant inquiry was not based on fact, but on error, and being erroneous was grossly prejudicial.

The Court of Appeals herein was unequivocal when citing 3 Wigmore on Evidence, 780 (Supp. 1962), it stated that as a general rule it was grossly improper for a cross-examiner to baselessly suggest that a witness had been convicted of a crime, particularly a felony. It in contrast to the other Circuits refused to follow this rule in the present case. This conflict as between the Second and the other Circuits should be resolved by this Court.

II.

The Court's Charge was Highly Prejudicial.

Shortly after the Court began its charge to the jury, it stated:

> "Now, preliminarily, before taking up the statute which is the basic point to begin with in this case, let me just say preliminarily that I believe all of us, counsel on both sides, you ladies and gentlemen, and the Judge, are in accord that this is an important case. An important case to both sides.
>
> What are the critical, competing interests involved? On the one hand, the Government is concerned, and rightfully so, that the revenue laws of the United States be enforced, that they not be violated. There is, in the language of the Supreme Court of the United States, no more serious crime than the crime of defeating or evading taxes or a conspiracy to do so.
>
> The reason for rigorous, strict enforcement of the Internal Revenue laws is perfectly obvious to all of us. All we have to do is recount the events of the last few weeks, even during the period that this case has been on trial. We all recognize, the defendant, the Government, their counsel, all of us, that but for the impartial, vigorous, intelligent enforcement of the revenue laws of the United States, we would be in a sorry situation. Certainly the liberty of all of us, indeed, the liberty of the free-speaking world, in a very real sense, is keyed to the proper enforcement of our own Internal Revenue laws.
>
> In short, to strike at or evade income taxes, is to strike at the jugular vein of our American system of government. That's the interest of the Government in this case and it is the interest of all of us."

The Court of Appeals held that some of the comments therein contained "were unfortunate, and taken in isolation, might have raised improper inferences in the jurors' minds. However, considering their content and purpose, we do not feel that they could have had any significant effect" (Appendix A, p. 9a, *infra*).

A jury in a criminal case is not to be concerned with national or international events, save as they might be evidence in the case. The Government is but one of the litigants in a criminal proceeding and it, as well as everyone's liberty is preserved when justice is done.

It is submitted that the holding of the Court of Appeals that while it might be that portions of the Court's charge were unfortunate, and insulated, might have raised improper inferences in the jury's minds, nonetheless within their context they were without significance, was error. For it is when viewed within the context of a Court beginning its charge with a statement that:

> "There is, in the language of the Supreme Court of the United States, no more serious crime than the crime of defeating or evading taxes or the conspiracy to do so",

and its subsequent instruction to the jury to disregard the same that the error becomes patent. For the tenor of the Court's entire charge was:

> "Certainly the liberty of all of us, indeed, the liberty of the free speaking world, in a very real sense, is keyed to the proper enforcement of our own Internal Revenue laws."

The singular proposition that the worthy banners of Western civilization depend upon the efforts of the Com-

missioner of Internal Revenue could not fail to affect the jury in a fashion prejudicial to the petitioner. The Court's charge was significant and its effect prejudicial. Such a charge should not have been permitted to stand.

CONCLUSION

For the reasons hereinabove set forth this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRVING I. ERDHEIM
Attorney for Petitioner

THEODORE KRIEGER
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 75—September Term, 1963.

(Argued November 1, 1963 Decided January 27, 1964.)

Docket No. 28027

UNITED STATES OF AMERICA,

Appellee,

—v.—

JEROME J. HASKELL,

Appellant.

Before:

SWAN, CLARK[1] and MARSHALL,

Circuit Judges.

Appeal from a judgment of conviction of conspiracy in violation of 18 U.S.C. §371, entered on a jury verdict of guilty after trial in the United States District Court for the District of Connecticut, William H. Timbers, *Judge*. Affirmed.

ROBERT C. ZAMPANO, United States Attorney, District of Connecticut, New Haven, Connecticut, *for Appellee.*

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[1] Judge Clark died after voting for affirmance, but before expressing his views with respect to this opinion.

IRVING I. ERDHEIM, New York, N. Y. (Jacob W. Friedman, of counsel), *for Appellant.*

MARSHALL, *Circuit Judge*:

The questions presented on this appeal are the sufficiency of the evidence to sustain appellants conviction of a violation of the general conspiracy statute, 18 U.S.C. §371;[2] and alleged error in the ruling on evidence at the trial and in the charge to the jury.

The one-count indictment charged appellant Haskell, a former key employee of Esquire Motors, Inc.,[3] an automobile dealership in Bridgeport, Connecticut, and Vincent Anthony, president of Esquire with conspiring with each other and unknown persons during the period June 1, 1954 to June 1, 1957 to wilfully attempt to evade and defeat a large part of the income taxes owing to the United States Government by Esquire, Anthony and Haskell, for the fiscal years ending September 30, 1955 and September 30, 1956. The means alleged were that the defendants would make continuing efforts to avoid detection and prosecution of tax frauds, that they perpetrated a scheme to take fraudulent deductions on Esquire's returns of $21,000 in 1955 and $25,000 in 1956, that checks were entered on the corporate

---

[2] Defendant made motions for judgment of acquittal both at the close of the government's case and at the close of all the evidence, which were denied. Consequently, the question before us is the sufficiency of the evidence, as a whole, to sustain the verdict, rather than whether a prima facie case was made out by the government. *Small* v. *United States*, 255 F. 2d 604 (1 Cir. 1958); *McDonough* v. *United States*, 248 F. 2d 725 (8 Cir. 1957); *T'Kach* v. *United States*, 242 F. 2d 937 (5 Cir. 1957); *United States* v. *Aman*, 210 F. 2d 344 (7 Cir. 1954).

[3] Hereinafter referred to as "Esquire."

records payable to Haskell for purported travel and entertainment expenses and bonuses, and that these checks were not cashed. The overt acts alleged were the issuance of checks to Haskell of $21,000 (dated September 30, 1955) and of $19,000 (dated September 29, 1956), which were not cashed. Anthony was convicted on his plea of *nolo contendere*, entered shortly before trial, and the trial proceeded with Haskell as the only defendant.

Three principal witnesses testified for the government. They were Ralph Piccolo, Jr., Esquire's accountant who prepared its returns during the relevant years; Stephen J. Catandella, Esquire's bookkeeper and Anthony's son-in-law, and Anthony himself. Although there were some variations in their testimony, particularly with regard to dates, they agreed on most essential points. Taking the evidence in the light most favorable to the government, the jury might find the following facts from their testimony.

Haskell joined Esquire in late 1954, under an oral agreement with Anthony that he would receive fifty per cent of the profits less his salary, which was originally fixed at $250 per week and later increased to $300. He immediately took charge of the business, did virtually all of the buying of cars from other dealers and a large part of the selling. Thanks largely to his efforts, Esquire's gross sales jumped from about $2,000,000 in fiscal 1954 to over $10,000,000 in fiscal 1955. Shortly before the close of fiscal 1955, Piccolo prepared a tentative profit and loss statement showing a certain amount of income tax due. He showed this to Haskell, Anthony and Catandella. After looking it over, Haskell threw the statement down, told Piccolo that he was an idiot, that there was too much tax and that they weren't

going to pay so much tax. A second meeting between the men, together with an accountant named Henry Clauson was held after the close of the fiscal year,[1] at which Haskell submitted to Piccolo a revised statement that showed additional expenses of $40,800 in the travel and entertainment category. Piccolo protested that "you can't just take travel and entertainment expenses without some substantiation," but ultimately agreed to fill out a return using the revised figures. When Anthony asked whether this might cause trouble with the income tax people, Haskell answered "well, the worst could happen, Uncle Sam would ask you for the refund and you would have to pay a penalty plus interest on it." On the night of the meeting, Catandella made out three checks, predated to September 30, 1955, one to Haskell for $21,000, one to Anthony for $16,000, and one to himself for $3,800. Haskell designated these amounts. The checks to Anthony and Catandella cleared the bank, but not the one to Haskell, which apparently disappeared. With regard to the 1956 return, the government's evidence was less conclusive. According to Catandella, about two or three weeks after the close of the fiscal year some unidentified person told him to make out the check to Haskell, he drew it, placed it on Haskell's desk, in his presence, and did not see it again. Piccolo testified that, after the income tax return was filed, he noticed while preparing a bank reconciliation that the check had not cleared. He suggested to Anthony and Haskell that an amended return be filed, restoring the amount to income. Haskell never responded but Anthony

[1] Piccolo initially fixed the date of the meeting as December 1955, Catandella thought it was in October. Anthony testified that it was in September, which would place it before the end of the year.

may have said that the check had not been cashed because there was "no money in the bank." Catandella also testified that Haskell frequently told him to draw checks, but that Anthony had to sign them all.

The foregoing recital establishes that a jury might find that a conspiracy to evade Esquire's taxes existed among Haskell, Anthony, Piccolo and Catandella, with respect to the 1955 return. Haskell not only participated in the conspiracy but indeed actually directed it. All the participants were aware that the claimed deductions for travel and entertainment were not substantiated, and that it was wrong to take them without proof. The evidence regarding the preparation of the 1956 return is weaker but we need not consider whether, standing alone, it would have warranted submission to the jury. A single conspiracy was charged, and it was more than adequately proved. Cf. *United States* v. *Postma*, 242 F. 2d 488, 496 (2 Cir. 1957); *Needy* v. *United States*, 145 F. 2d 828 (5 Cir. 1945); *Moss* v. *United States*, 132 F. 2d 875 (6 Cir. 1943).

The most important of the trial errors assigned as grounds for reversal of the judgment concerns a series of questions which defendant was asked on cross-examination. The matter was broached for the first time on Haskell's direct examination, when his counsel asked whether he was ever convicted of petit larceny, and elicited the answer that he was convicted in 1934 or 1935, and also that he was convicted of speeding. On the next day, the prosecutor first got Haskell to repeat his admission of a petit larceny conviction and then asked, "weren't you convicted of grand larceny and not petit larceny," to which Haskell replied in the negative. The prosecutor then showed Haskell Govern-

ment Exhibit K for identification, an FBI "rap sheet" which showed that Haskell was arrested on August 26, 1942 for grand larceny in New York, and was sentenced to one year (suspended) "on CL of GL and PL.," and asked him again whether he was convicted of grand larceny. Again a negative answer was received. The government offered the paper in evidence; defense counsel objected and was sustained. Before trial resumed on the afternoon of that day, the prosecutor informed the judge that the FBI sheet, on which he relied for his questions with regard to a grand larceny conviction, was erroneous. In fact, Haskell in 1942 had been charged with grand larceny but pleaded guilty to petit larceny. The court instructed the jury to completely disregard any reference to a grand larceny conviction, because Haskell was never in fact convicted of that crime. He further stated that the reference to the traffic conviction should not be construed as having any bearing on the witness' credibility. Finally, he told the jury that the government had been instructed to provide proof of any criminal record in the form of certified copies of any judgments of conviction and that their minds should be kept completely open until the proof arrived. The judge later charged that the sole item in Haskell's record was a petit larceny conviction in 1942, to which counsel had stipulated.

As a general rule, of course, it is grossly improper for a cross-examiner to suggest that a witness has been convicted of crimes, especially felonies, when he has no support for the question. 3 *Wigmore, Evidence* §780 (Supp. 1962). Here, however, it appears that the prosecutor's examination was based on an honest reliance on the FBI report, that he informed defense counsel prior to trial of his in-

tention to bring up the grand larceny matter, and that he promptly moved to correct the erroneous impression which the jury might have acquired despite Haskell's denial that such a conviction was on his record. The judge was equally vigorous in protecting the defendant's rights. Furthermore, no objection was lodged to the two specific questions dealing with the grand larceny conviction. In the light of all these circumstances, asking the questions on this point were not reversible error.

Two other points relating to examination are raised. On cross-examination of Anthony, whom the defense recalled after he testified for the Government, the prosecutor asked, "Did you give any money to Mr. Haskell over and above the salary that was paid out of Esquire Motors?" Counsel objected to the question, and moved for a mistrial after an affirmative answer was given, on the ground that it tended to show Haskell was guilty of another crime, i.e., failure to report income on his personal return. This point is not well taken. On Haskell's individual tax return, which was in evidence, he showed salary of $24,800, and $21,000 as an advance for traveling expenses, together with $20,782.05 claimed expenses. It was proper cross-examination to determine whether the moneys reported as advanced had ever been paid from other funds than the $21,000 check which never cleared. Another asserted error concerns a ruling sustaining a prosecution objection to a question which defense counsel asked of Max Hecht, a certified public accountant called as an expert witness for the defense. The question was "Now, in your opinion, and based upon your experience, sir, was it wrong for Mr. Haskell to claim a deduction for travelling expenses for the years 1955 and 1956?"

Defense counsel then stated that he was merely attempting to show that travel and entertainment expenses were a proper category of deduction. He then asked the question "Is a deduction for travel and entertainment a proper deduction, if used in connection with one's business," and received an affirmative reply. Since this answer established what defendant sought to show, no grounds for objection eixst.

We next turn to the court's charge, which was a long and comprehensive one that occupies over one hundred pages in the transcript and took over four hours to deliver. Before he went into the specific elements of the offense and a review of the evidence, the judge made some preliminary observations concerning the interests at stake in the trial. Specifically, he said:

> Now, preliminarily, before taking up the statute which is the basic point to begin with in this case, let me just say preliminarily that I believe all of us, counsel on both sides, you ladies and gentlemen, and the Judge, are in accord that this is an important case. An important case to both sides.
>
> What are the critical, competing interests involved? On the one hand, the Government is concerned, and rightfully so, that the revenue laws of the United States be enforced, that they not be violated. There is, in the language of the Supreme Court of the United States, no more serious crime than the crime of defeating or evading taxes or a conspiracy to do so.
>
> The reason for rigorous, strict enforcement of the Internal Revenue laws is perfectly obvious to all of us. All we have to do is recount the events of the last few weeks, even during the period that this case has been

> on trial. We all recognize, the defendant, the Government, their counsel, all of us, that but for the impartial, vigorous, intelligent enforcement of the revenue laws, of the United States, we would be in a sorry situation. Certainly the liberty of all of us, indeed, the liberty of the free-speaking world, in a very real sense, is keyed to the proper enforcement of our own Internal Revenue laws.
>
> In short, to strike at or evade income taxes, is to strike at the jugular vein of our American system of government. That's the interest of the Government in this case and it is the interest of all of us.

After these remarks, the judge devoted considerable time and effort to explaining the rights and interests of a defendant in a criminal trial. Later, on objection by counsel he instructed the jury to disregard the statement that the Supreme Court had called tax evasion among the most serious of crimes. Objection to these paragraphs is nonetheless pressed here.

It may well be that some of the comments made by the trial court were unfortunate, and taken in isolation, might have raised improper inferences in the jurors' minds. However, considering their context and purpose, we do not feel that they could have had any significant effect. The judge was merely making some preliminary remarks to set the case in focus, as it were. All elements of the crime charged, burden of proof, and the manner of weighing evidence were later gone into in the most painstaking and thorough way. It is difficult to see how these few words could have inflamed the jury against the defendant.

The next objection concerns the court's instruction on character witnesses. The instruction was as follows:

There has been some character testimony here. As you will recall, several of the witnesses called by Mr. Haskell, testified to his character. Good reputation is not a defense to a crime. We all know that it is not an extraordinarily rare thing for men of very good reputation to be found to have committed some crime. And yet, the law recognizes the relation between good reputation in general, and a particular crime. Good reputation is usually based upon good character, to a greater or lesser extent, and the law says that if a man has a good character, it is perhaps less likely that he has committed a particular crime which is charged against him. It does not mean that if a man actually has a good reputation, that he does not commit the crime. His good reputation in the community is, if you find it proven, a circumstance that you are to weigh with the other circumstances in the case in arriving at your final conclusion.

On a doubtful question, good reputation alone might be of sufficient weight to raise a reasonable doubt as to the guilt of the accused.

Defendant objected to the failure to charge in the exact language he requested, which was "that evidence of defendant's good character is in the same category as other factual evidence and must be considered by you in your deliberations, and may of itself, if believed by you, create a reasonable doubt when otherwise no reasonable doubt would exist." We feel that the charge, as a whole, fairly set forth the position of character evidence, and permitted the jury to consider good reputation along with all the other evidence in the case. The jury was not instructed as in *Edgington* v. *United States*, 164 U. S. 361 (1896), to consider character testimony only if the other evidence was

equally balanced. Even if the one phrase, "on a doubtful question," be deemed too restrictive a view of the function of character evidence, see *Michelson* v. *United States*, 335 U. S. 469 (1948); *United States* v. *Minieri*, 303 F. 2d 450 (2 Cir. 1962), any error resulting from its inclusion was in the circumstances of this trial quite insubstantial. Cf. *United States* v. *Kushner*, 135 F. 2d 668, 674 (2 Cir. 1943).

Finally, appellant complains of the following language toward the conclusion of the charge:

> You, therefore, will take this case with you to the jury room, determine the facts on the basis of the evidence as it has been presented to you, apply the law as I have attempted to outline it to you, then render a verdict fairly, uprightly, and without a scintilla of prejudice, which I am sure is unnecessary to say to you, ladies and gentlemen, either against the defendant or against the Government.

He asserts that this amounted to an instruction that the verdict be either against the defendant or against the Government. As a matter of interpretation of language, this is erroneous. The phrase "against the defendant or against the Government" clearly related to "without a scintilla of prejudice" rather than to "render a verdict." The court repeated its charge in slightly different form after counsel objected, and added "Your verdict must be in the form of either not guilty as charged, or guilty as charged." No possibility of misunderstanding existed.

The trial lasted eight days, and was marked by both vigorous advocacy on each side and scrupulous fairness of the judge. Ample evidence to support the verdict exists, and no prejudicial errors have been shown. Therefore, the judgment is affirmed.

APPENDIX B

Constitutional Provision

AMENDMENT 5, UNITED STATES CONSTITUTION.

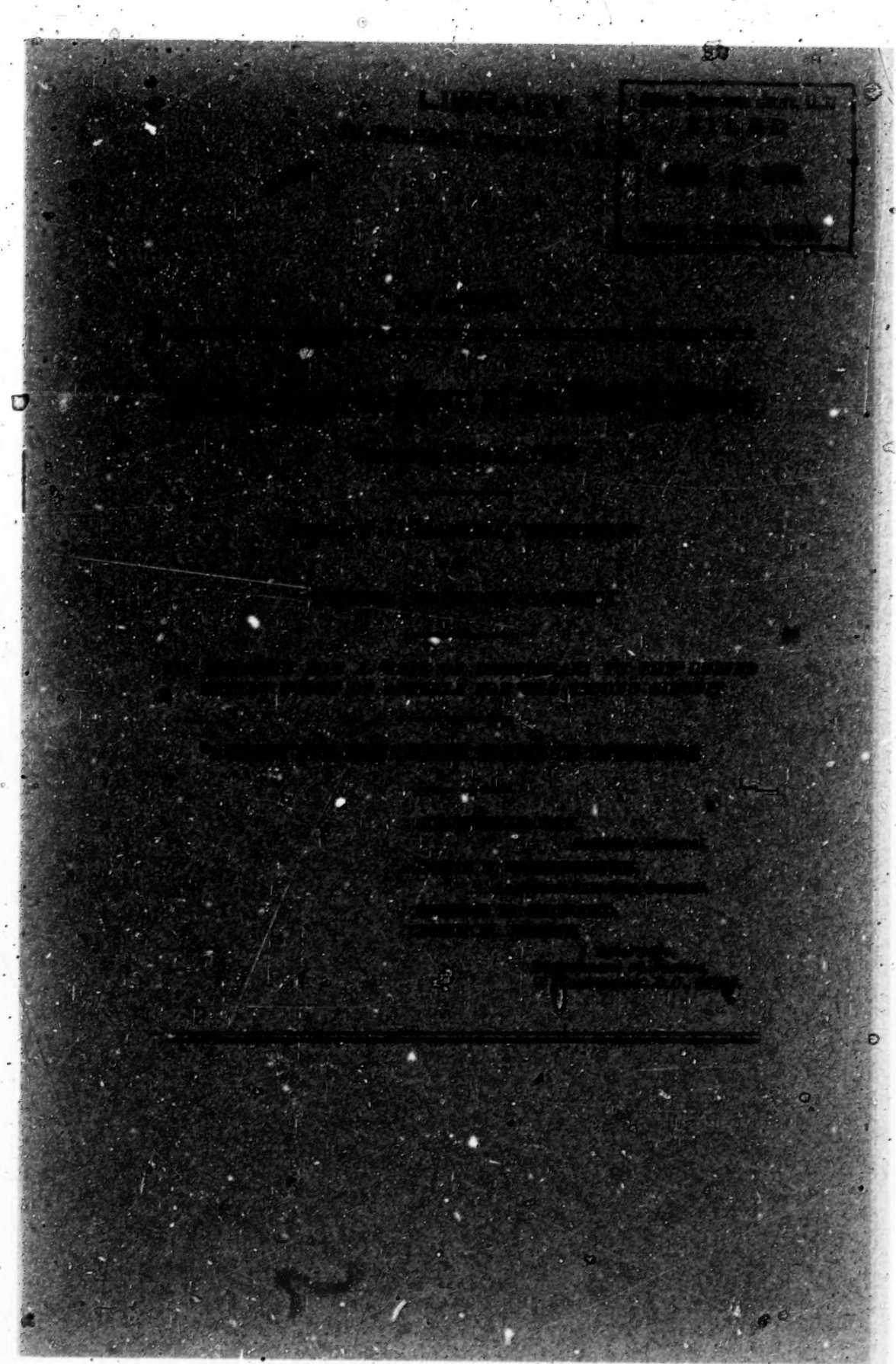
"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or in indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statute Involved

Title 18, United States Code

Section 371. Conspiracy to commit offense or to defraud United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. (June 25, 1948, c. 645 § 1, 62 Stat. 701.)



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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 989

JEROME J. HASKELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's memorandum (R. 149a–168a),[1] denying petitioner's motion to set aside the verdict, is reported at 217 F. Supp. 534. The opinion of the court of appeals (Pet. 1a–11a) is reported at 327 F. 2d 281.

JURISDICTION

The judgment of the court of appeals was entered on January 27, 1964 (Pet. 1a) and the petition for rehearing denied on February 19, 1964. On March 9, 1964, Mr. Justice Harlan extended the time within

[1] "R." and "Supp. R." refer to petitioner's and the government's appendix in the court of appeals, respectively.

which to file a petition for a writ of certiorari to and including April 18, 1964. The petition was filed on April 10, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied a fair trial by questions asked him on cross-examination which erroneously suggested that he had been convicted of grand larceny when the trial court twice explicitly told the jury that petitioner had actually been convicted only of petit larceny.

2. Whether petitioner was denied a fair trial by general observations made by the trial judge in his instructions to the jury concerning the seriousness of the crime of tax evasion.

STATEMENT

Petitioner and one Vincent Anthony were indicted in one count under the general conspiracy statute, 18 U.S.C. 371, for conspiring together and with persons unknown to evade and defeat the federal income taxes owed by them and by a certain corporation for the fiscal years ending September 30, 1955, and September 30, 1956 (R. 12a–14a). Petitioner was convicted after a jury trial. (Anthony had previously entered a plea of *nolo contendere*) and, on appeal, the court below affirmed (R. 3a, 7a, 148a; Pet. 11a).

Petitioner testified in his own defense. On direct examination, his counsel asked him if he had been convicted of petit larceny in 1934 or 1935. Petitioner answered in the affirmative and testified further that

he had subsequently been convicted of no other crime except for speeding (Supp. R. 66a). On cross-examination, the prosecutor asked petitioner whether the conviction was not for grand larceny rather than petit larceny and petitioner answered in the negative (R. 27a). After an interruption caused by an objection, the prosecutor asked whether on August 26, 1942, petitioner was convicted of grand larceny in the State of New York, and petitioner answered, "I was not" (R. 29a). The court then sustained an objection to the prosecutor's offer of an F.B.I. report which indicated that petitioner had been convicted of grand larceny (R. 30a, 156a), but denied a motion for a mistrial (R. 30a). The next day petitioner, still under cross-examination, testified that he had been convicted of petit larceny but he was not sure as to the year when this occurred (R. 42a).

Later that day after the noon recess and before the jury was brought in, the prosecutor told the court that, in view of petitioner's testimony at the morning session, he had asked the F.B.I. to verify the F.B.I. report of a grand larceny conviction, on which he had relied. The F.B.I. replied that the report was erroneous, petitioner having been indicted for grand larceny but having been convicted only of petit larceny (in 1942) on his plea of guilty to the latter offense (R. 43a–44a). Therefore, the prosecutor requested the court to instruct the jury to disregard the question referring to grand larceny and to inform it that the government conceded that the conviction was only for petit larceny (R. 44a). Peti-

tioner's counsel refused to consent to this procedure, claiming incurable prejudice and moving for a mistrial (R. 44a, 49a–52a). The court denied the motion (R. 51a). The jury then returned to the court room and the court gave the following instruction (R. 53a–54a):

> The COURT: I would like to say to the jury very briefly two things with respect to certain testimony that was given this morning on the subject of Mr. Haskell's alleged criminal record.
>
> Number one, I instruct the jury totally to disregard any reference to a conviction for grand larceny. As I recall the evidence, in short, on that, was that Mr. Haskell denied that he had ever been convicted of grand larceny.
>
> Government counsel have informed the Court right after the noon recess, and before you ladies and gentlemen came in, that on the Government's check this morning—or, this noontime—after this matter was raised, it has disclosed that Mr. Haskell was not convicted of grand larceny in August of 1942, which is the date referred to in the Government's question.
>
> Rather, according to information by the Government, which will be subject to verification by the Government before this case is closed, the record shows that on or about that time, August, 1942, Mr. Haskell pleaded guilty to a charge of petty larceny. So, without elaborating on this subject any further, I will ask each of you ladies and gentlemen to totally wipe the slate clean, so far as Mr. Haskell is concerned with respect to any reference, even in the Government's question, to a charge of grand larceny.

> What it amounts to, in short, is: The Government, having confirmed the correctness of Mr. Haskell's answer when he denied that he'd been convicted of grand larceny, and the Government, having brought that to my attention as promptly as Mr. Zampano was informed about it, I now bring it to your attention, and ask you to be scrupulously careful to disregard any reference to a conviction of grand larceny. It is not so.

Later, a stipulation concerning the conviction for petit larceny was read to the jury (R. 58a).

On the following day (R. 59a), the court delivered its charge to the jury and, as requested by petitioner's counsel (R. 131a–132a), instructed it as follows (R. 134a):

> Number two, I inadvertently omitted to instruct you when I charged you with respect to the stipulation entered into by counsel yesterday regarding Mr. Haskell's prior criminal record. As you will recall, I believe this stipulation was dictated on the record by Mr. Erdheim [petitioner's counsel] and read to you. It is, in substance, this: That the only conviction of record against Mr. Haskell is for a misdemeanor, petty larceny, in August, 1942.
>
> Aside from that misdemeanor, he has no criminal record whatsoever, and I so charge you.

After the jury rendered its verdict, petitioner moved for acquittal or a new trial on the ground, *inter alia*, of prejudice allegedly arising from the question concerning a conviction for grand larceny (R. 146a). The court denied the motion (R. 150a)

and recited at length, in a memorandum, all the relevant circumstances (R. 154a–167a). The court quoted from the record to show that the prosecutor informed petitioner's counsel, about a week before the trial, that the government had information that petitioner had committed grand larceny, and that his counsel thereafter explored the problem and concluded that there was no such conviction but never informed the prosecutor (R. 155a–156a). The court concluded that the prosecutor had acted entirely in good faith on the basis of an erroneous F.B.I. report and that, in any event, the petitioner suffered no prejudice (R. 164a–167a).

In its charge to the jury (R. 60a–122a) the court first made certain general observations concerning the importance of the case (R. 61a–63a), explaining the necessity for a "vigorous, intelligent enforcement of the revenue laws" and the seriousness of the crime of tax evasion (R. 61a–62a) and, on the other hand, the importance of a fair trial, which the court said was a matter "of equally vital concern to all of us" (R. 62a–63a). Petitioner excepted to the language used by the court in describing the serious character of the offense (R. 123a). The court, acceding in part to the exception (R. 131a), instructed the jury to disregard its statement that "There is, in the language of the Supreme Court of the United States, no more serious crime than the crime of defeating or evading income taxes, or a conspiracy to do so" (R. 134a).

ARGUMENT

1. Petitioner's own counsel first introduced the subject of prior convictions, obtaining from petitioner the admission that he was once convicted of petit larceny (Supp. R. 66a). The prosecutor admittedly made a mistake in asking petitioner on cross-examination whether he had been convicted of grand larceny. After the petitioner had denied this, the prosecutor ascertained that the denial was correct and, on his own motion, brought this matter to the attention of the trial court. The court then twice instructed the jury that it should totally disregard the reference to a grand larceny conviction because petitioner's sole criminal record consisted of the conviction for petit larceny.

Petitioner is himself partially responsible for any possible prejudice since his counsel had been informed before trial that the government believed that petitioner had been convicted of grand larceny and counsel had ascertained that this was erroneous. Nonetheless, counsel did not inform the government of its error. Surely, in these circumstances, petitioner cannot rely on the mistake made by the government.

In any event, it clearly appears that petitioner suffered no prejudice. Any possible prejudice was swept away by the prosecutor's prompt admission that he was completely mistaken and by the court's

---

Apparently, this instruction was overly favorable to petitioner. The district court subsequently stated: "As later disclosed by defendant's pre-sentence report, this charge regarding defendant's criminal record was more favorable than the facts warranted" (R. 164a).

clear instructions to the jury. Petitioner, however, ignores the remedy afforded him and instead cites (Pet. 8–12) readily distinguishable cases where there was no retraction and no cure.

2. There is no merit to the contention (Pet. 13–15) that petitioner was prejudiced by the court's general observations on the gravity of the offense of tax evasion (R. 61a–62a). There can be no doubt that the court's statements were correct.[3] As this Court has observed, "The power to tax is the one great power upon which the whole national fabric is based" (*Nicol* v. *Ames,* 173 U.S. 509, 515), and "taxes are the life-blood of government, and their prompt and certain availability an imperious need" (*Bull* v. *United States,* 295 U.S. 247, 259).

The only question is whether there was any lack of fairness in the court's remarks. Clearly there was not, since the court immediately invited the jury to consider "the vital interests of the individual Haskell, as a defendant here on trial," and admonished them to give "not just lip service, but full impact, giving him the full benefit of the triumvirate of his basic rights," including the presumption of innocence and the requirement that the government "prove its case beyond a reasonable doubt" (R. 62a–63a). Thus, while the judge stated on the one hand that "to strike at or evade income taxes, is to strike at the jugular vein of our American system of government" (R.

[3] The trial court actually withdrew one of its statements on petitioner's objection and told the jury to disregard it (see p. 6 above).

61a), he also observed on the other that "If an enemy were to strike at our society, one of the very first things that would be stricken down would be the right to a jury trial" (R. 62a). As the court of appeals said (Pet. 9a):

> The judge was merely making some preliminary remarks to set the case in focus, as it were. All elements of the crime charged, burden of proof, and the manner of weighing evidence were later gone into in the most painstaking and thorough way. It is difficult to see how these few words could have inflamed the jury against the defendant.

In short, if the challenged observations are taken in the context of the entire charge, it is readily apparent that the claim of prejudice is without substance.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1964